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Air Bag Litigation: Plaintiffs, Start Your Engines

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INTRODUCTION

Each year an estimated 44,000 Americans are killed, and another two million injured, as a result of automobile accidents.[1] These figures represent the high risks of death or incapacity to a significant percentage of the country's population through the use of the automobile.[2]

Automobile manufacturers have a legal duty to provide American consumers with a reasonably safe product.[3] Consumers, relying on this, believe that their cars are sufficiently equipped to protect them in the event of an accident. One question which arises in light of their legal duty is why auto makers have failed to provide consumers with the "air bag system,"[4] a proven safety device, when the technological means to do so have been available for over a decade?[5] Experts estimate that this device could save over 9,000 lives and prevent

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1. *Time For 'Passive Restraint,'* L.A. Daily J., Dec. 2, 1983, § 1, at 4, col. 1.

2. *Id.* Additionally, it currently costs $57 billion a year in insurance, medical costs, and lost taxes as a result of the high accident rate. *Id.*

3. 1 R. GOODMAN AND THE CENTER FOR AUTO SAFETY, AUTOMOBILE DESIGN LIABILITY § 1.4, at 7 (2d ed. 1983) ("the manufacturer must design his product so that it is safe for any reasonably foreseeable use"). *See also* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 645 (4th ed. 1971).

4. Air bag systems consist of five components which function automatically in crashes to protect occupants of the vehicle. The components are:

1) the sensors, which activate the system upon a specific impact to the car;
2) the wire, which transmits the triggering impulse to the rest of the system;
3) the inflators, which generate the gas;
4) the air bags, which balloon out into the passenger compartments; and
5) an electronic monitoring system to regularly inspect the operation of the system as a whole.

See Teret & Downey, *Air Bag Litigation*, TRIAL, July 1982, at 93, 93.

5. *See, e.g.*, Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981). Auto makers are placed in the position of having to balance public safety concerns against the economic effects on their respective companies. In *Grimshaw*, a Ford Pinto was rear-ended, causing the gas tank to explode and engulf the car in flames. *Id.* at 773-74, 174 Cal. Rptr. at 359. The Ford Motor Company had decided that it was not cost effective to modify their 1972 Pinto gas tanks, concluding that a recall of the cars would be much more expensive than potential exposure to civil liability for the defect. *Id.* at 776-78, 174 Cal. Rptr. at 361-62. As a result of this decision, the jury returned a verdict against Ford in the amount of $125 million in punitive damages alone. This figure was subsequently reduced to $3.5 million. *Id.* at 771-72, 174 Cal. Rptr. at 358.

countless injuries each year.[6] Automobile manufacturers, as well as federal agencies, have repeatedly failed or refused to take the necessary steps toward providing this life-saving protection to the American consumer.

The auto maker's reluctance to install the air bag system has sparked litigation under the law of products liability. This comment will analyze whether auto makers may be held liable for failing to provide air bag protection to consumers who suffer injuries that could have been prevented had the air bag system been installed. Next, this comment will discuss the legal bases and strategies utilized by injured plaintiffs and possible defenses available to auto makers in regard to such claims. Finally, recent judicial and legislative action within this controversial new area will be examined.

II. HISTORICAL DEVELOPMENT OF THE AIR BAG ISSUE

The air bag protection system consists of an inflatable device which is concealed in the dashboard and steering column of the automobile.[7] This device automatically inflates when sensors indicate that an impact has occurred which exceeds the predetermined deceleration minimum.[8] These sensors, located on the front end of the automobile, register only on impact.[9] The air bags inflate from underneath the dashboard and steering column to protect both the driver and passenger from a violent impact with the interior of the automobile. The air bags then rapidly deflate after they have absorbed the impacting forces of the occupants within the automobile.[10]

The National Highway Traffic Safety Administration (the NHTSA)

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6. This estimation is based on findings that the air bag system affords the car occupants greater protection from impacting with the interior of the car (known as the second collision). Fatalities and serious injuries are primarily the result of the occupants impacting against fixtures within the car, such as the steering wheel, dashboard, and windshield. Air bags provide protective insulation between such fixtures and the occupants in an accident. *Id.*

7. *Id.* at 93.

8. The air bag system is regarded as a passive restraint system because it requires no action on the part of the occupants to become operative. Another example of a passive restraint is the automatic seat belt which is connected to the vehicle door and automatically secures the passenger when the door is closed. Nonpassive restraint systems, such as traditional seat belts, require action on the part of the occupants to become operative and are otherwise ineffective in offering protection. *Id.*

9. *See infra* note 10.

10. Lifsher, *Do Air Bags Really Work—and Are They Worth The Cost?*, L.A. Daily J., Apr. 29, 1985, § 1, at 4, col. 3. Air bags are effective in their purpose because they automatically inflate in frontal collisions exceeding 12 mph, which comprise about sixty percent of all automobile accidents. Sensors are located under the car's front bumper; when activated within 1/40th of a second two large cushions inflate with nitrogen gas, one located in the steering column and one under the passenger dashboard. Occupants are thrust forward into the cushions rather than hitting the vehicle's windshield, dashboard, or steering column. The cushions, then, rapidly deflate after such an impact. *Id.*

estimated in 1977, that the installation of passive restraint systems such as the air bag could prevent approximately 12,000 deaths and over 100,000 injuries annually.[11] This estimate was based on substantial on-road experience.[12] Nevertheless, proposed air bag safety standards have met with political delays as well as strong opposition from the automobile industry.[13]

In 1953, a United States patent was granted to John W. Hetrick for his air bag system.[14] During the 1960's, the system had progressed to such an advanced technological state that auto makers, as well as governmental regulatory agencies, were optimistic about its installation and use.[15] By 1969, the National Highway Safety Bureau (NHSB), responding to congressional concerns over the rapidly increasing national traffic death toll rate, proposed safety standards which required the lifesaving air bags to be installed in all new cars.[16] However in 1971, the air bag system had become entangled in a political web and the NHTSA provided for a two year delay in enforcing the standards which had been proposed by the NHSB. This entanglement was primarily due to the auto industry's concerns over the economic impact of the air bag safety standards on auto manufacturers.[17]

Legislative success seemed imminent in 1974 when the NHTSA proposed that the air bag standards should take effect beginning with

11. Coben, *Building A Crashworthy Car*, TRIAL, July 1985, at 28, 29 (quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 103 S. Ct. 2856 (1983)).

12. *See* NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, AUTOMOBILE OCCUPANT CRASH PROTECTION, PROGRESS REPORT NO. 3 (July 1980) [hereinafter cited as NHTSA PROGRESS REPORT]. Additionally, since 1969, the Department of Transportation has conducted over 2,000 crash tests with air bags involving human volunteers and dummies.

13. Special lobbying groups representing the automobile industry exerted substantial political pressure on the legislature regarding the mandatory implementation of air bags. This pressure provided an uphill struggle for proponents of the air bag system. *See* Teret & Downey, *supra* note 5, at 93, 94.

14. John Hetrick's air bag system was the first of its kind. The system consisted of a safety cushion which automatically inflated when the vehicle slowed down. It was later developed by the auto industry and independent research firms into the present air bag system. *Id.* at 93-94.

15. *Id.* at 94. "Papers published in automotive engineering journals praised air bag systems, and at a meeting held in 1968, the government and manufacturers pledged mutual support of efforts to get air bags into cars." *Id.*

16. Goins, *Product Liability*, TRIAL, July 1985, at 74. The proposed restraint standards set forth by the NHSB (now the NHTSA) provided for the development of mandatory legislation requiring auto makers to install automatic restraint systems, such as air bags or automatic seat belts. *Id.*

17. *Id.* (citing INSURANCE INSTITUTE FOR HIGHWAY SAFETY, AIR BAGS: A CHRONOLOGICAL HISTORY OF DELAY 1 (rev. ed. 1984) [hereinafter cited as IIHS]).

the 1977 models.[18] The agency also provided a cost-benefit analysis with this proposal which showed that air bags were superior to lap/shoulder seat belts in lifesaving potential.[19] In 1976, Secretary of Transportation William T. Coleman asserted that the department had found that air bag systems could save more than 12,000 lives a year.[20] He urged General Motors (GM) and other auto manufacturers to voluntarily begin providing air bags in their automobiles.[21] GM agreed to produce, beginning in 1979 and continuing over two model years, 300,000 cars with the air bag system installed.[22] This agreement never became a reality due to concerns over public acceptance of the air bag and GM's poor success with air bag systems marketed in their 1974-76 luxury models.[23] However, it is interesting to note that all of the 1974-76 luxury models that were equipped with air bags were purchased by consumers during those years.[24]

In 1977, the newly appointed Secretary of Transportation, Brock Adams, provided a plan requiring installation of front seat passive restraints in all new cars according to model size beginning with 1982 full-size models.[25] But in 1980, this measure was defeated by a vote in both houses of Congress to block efforts to implement and enforce the proposed standards.[26] In December of 1979, Michigan Representative David Stockman offered a compromise bill which would allow consumers to choose between automatic seat belts and air bags.[27] Although this legislation was approved by Congress, the Department of Transportation could not implement the standards until the 1982 model year.[28]

When it finally appeared that the air bag system had been transformed into a favorable political issue supported by legislators, the Reagan administration moved into town carrying the banner of gov-

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18. *Id.* (citing IIHS, *supra* note 17, at 2).

19. *Id. See also* Teret & Downey, *supra* note 5, at 94.

20. Goins, *supra* note 16, at 74 (citing IIHS, *supra* note 17, at 3).

21. *Id.* (citing IIHS, *supra* note 17, at 3). *See also* Teret & Downey, *supra* note 5, at 94-95.

22. Goins, *supra* note 16, at 74 (citing IIHS, *supra* note 17, at 3). *See also* Teret & Downey, *supra* note 5, at 95.

23. Goins, *supra* note 16, at 74. Contrary to the expressed concerns of the industry, a 1977 Gallup Poll showed public acceptance of the air bag system as increasing. *See* Lifsher, *supra* note 10, at 4, col. 3.

24. Goins, *supra* note 16, at 74.

25. *Id.* (citing AUTOMATIC CRASH PROTECTION, U.S. DEPT. OF TRANSP. NEWS RELEASE, June 30, 1977).

26. *Id.*

27. *Id.* (citing IIHS, *supra* note 17, at 5).

28. *Id.* The Stockman compromise bill was not to become effective until 1982. "GM took advantage of the congressionally imposed delays and announced that it had cancelled plans to offer air bags in its 1982 full-sized cars . . . ." *Id.* (citing IIHS, *supra* note 17, at 5).

ernmental deregulation of the automobile industry.[29] As feared by air bag proponents, the new Secretary of Transportation, Drew Lewis, proposed a one year postponement of the effective date of the air bag standard.[30] In addition, Raymond Peck, head of the NHTSA, rescinded the congressionally approved standards proposed by David Stockman in October, 1981.[31]

Following the NHTSA's rescission of the passive restraint standards, the insurance industry filed a lawsuit in federal court.[32] The action sought review of the NHTSA's decision to rescind and also sought a stay of the rescission pending review. In May 1982, the United States Court of Appeals for the District of Columbia invalidated the rescission.[33] One year later, the Supreme Court ruled that the agency's decision to revoke the standard was "arbitrary and capricious" and remanded the issue to the NHTSA for consideration.[34]

More recently, in July 1984, Transportation Secretary Elizabeth Dole proposed a new version of the passive restraint standard which she intended to use to balance the conflicting interests. The proposed standard would require all 1990 models to be equipped with either automatic seat belts or air bags unless states representing two thirds of the nation's population implemented mandatory seat-belt-use laws by 1989.[35] This rule appeared to provide the impetus needed to effectuate air bag installation in the near future and also raised hopes that

29. *Id.* The Reagan Administration favored deregulation of the automobile industry to enable American auto makers to remain competitive with foreign manufacturers.

30. *Id.*

31. The rescission was said to be based on concerns for cost and public acceptance of the air bag system. *Id.* (citing Tolchin, *Air Bags and Regulatory Delay*, ISSUES IN SCI. & TECH., Fall 1984, at 67).

32. *See* State Farm Mutual Auto. Ins. Co. v. Department of Transp., 680 F.2d 206 (D.C. Cir. 1982), *vacated*, 463 U.S. 29 (1983).

33. *Id.* at 242. This case was heard ten months before the effective date of the restraint standards. These standards required that large and mid-size cars produced after September 1, 1982, and all cars produced after September 1, 1983, be equipped with passive restraints such as air bags or automatic seat belts. The circuit court reversed the NHTSA rescission on the ground that it was arbitrary and was not supported by an adequate explanation. *Id.*

34. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 46, 57 (1983). The Court agreed with the circuit court's findings, concluding that the NHTSA's reasoning did not justify rescission and was, therefore, arbitrary and capricious. The Court remanded the case in order for the NHTSA to reconsider its position on the issue. *Id.* at 57.

35. Goins, *supra* note 16, at 74 (citing Tolchin, *supra* note 31, at 79). Dole's version of the passive restraint standards was intended to present a compromise between the automobile manufacturers' concerns and the overwhelming need for public safety in automobile travel. *Id.*

consumers might soon be provided with the lifesaving protection that air bags can offer.

These hopes proved to be somewhat unrealistic as state legislatures began to consider mandatory seat belt laws. It now appears that Secretary Dole's version of the passive restraint rule will result in the installation of air bags or automatic seat belts. Probably enough states to represent two-thirds of the national population will enact mandatory seat belt legislation, and will effectively circumvent the requirement of passive restraints under Dole's rule. The automobile industry has planned to spend millions of dollars to promote seat belt legislation among the states. If successful, the industry will not be required to provide passive restraints in its 1990 model cars.[36]

As of October 1985, California became the sixteenth state to enact mandatory seat belt legislation.[37] Although it is not disputed that seat belt use will decrease the incidence of death and injuries due to automobile accidents, it is not the best solution in terms of providing optimal consumer protection.[38] It appears that the automobile industry may have won another round against the air bag restraint system, perhaps at the expense of and peril to consumers.

III. THE USE OF ECONOMIC PRESSURES THROUGH LITIGATION TO FORCE AIR BAG STANDARDS

A. The Economic Realities

Perplexing as it is, auto manufacturers and governmental agencies have either failed or refused to provide the lifesaving technology of the air bag system to the general public. Indisputably, automobile manufacturers have the technological means to save countless lives and to prevent serious injuries. To date, this device is available only in select Mercedes-Benz models.[39]

Speculation as to the effectiveness of the air bag system is not necessary. Between 1972 and 1976 there were 12,000 cars produced with

36. *Id.* (citing IIHS, *supra* note 17, at 10).

37. *See* CAL. VEH. CODE § 27315 (West 1985). This represents approximately two-thirds of the national population, which is enough to essentially "scrap" the chances of passive restraints under Secretary Dole's rule.

38. *See* Lifsher, *supra* note 10, at 4, col. 3. The Department of Transportation estimates that if the national seat belt use level reached the fifty percent rate, 4,380 automobile deaths could be prevented each year. The addition of the air bag system could more than double this figure. A combination of seat belts and the air bag system are the most effective restraint yet developed. A resident of Texas is living proof of this fact. He had purchased a Mercedes-Benz, equipped with an air bag system, which saved him from certain death after his car flew forty one feet through the air and smashed nose-first into the bank of a ravine. *Id.*

39. *Id.* at 4, col. 4. These Mercedes-Benz models come equipped with the air bag system at the option of the consumer and are the more expensive type models. However, Mercedes-Benz is currently considering to offer the system as standard equipment on all models. *Id.*

air bag systems.[40] These cars have logged approximately one billion road miles and were involved in over 200 crashes severe enough to trigger the systems, providing a large body of empirical data as to air bag effectiveness.[41] The reliability of air bag deployment[42] and the actual reduction in deaths and severity of injury to occupants of cars containing the air bag system are now well established.[43] The on-road experience of these automobiles has provided an excellent simulation of how air bag systems can work on a much larger scale, if made available in all automobiles sold in this country.

There is mounting concern that because automobile manufacturers and governmental agencies have not been successful in paving the way toward air bag installation, consumers may never receive the benefit of this lifesaving device. There is, however, a growing trend to move the air bag issue out of the regulatory agencies and into the courtroom.[44]

B. The Legal Theories

Plaintiffs are attempting to use existing products liability theories against automobile manufacturers[45] by asserting that auto makers

40. *Id.* at 4, col. 3-4. From 1974 to 1976 GM, Ford and Volvo offered the air bag system as options in these 12,000 automobiles. *Id.* at 4, col. 3.

41. There were approximately 250 air bag deployments in this fleet of cars. "[T]here have been only three inadvertent, on-road deployments; all three occurred in early, prototype systems, which have since been changed, and none resulted in loss of control of the car. Two of the inadvertent deployments resulted from the negligence of garage mechanics in earlier car repairs." Teret & Downey, *supra* note 5, at 96. *See also* Lifsher, *supra* note 10, at 4, col. 3-4. In the Mercedes-Benz models equipped with the air bag system, there have been nine deployments and " '[i]n all instances, the systems have operated as intended.' " Lifsher, *supra* note 10, at 4, col. 4 (quoting Karl-Heinz Faber, North American Vice President, Mercedes-Benz).

42. Based on the on-road experience of this fleet of automobiles, "The NHTSA estimated the reliability of air bag systems to be 99.995 percent or higher." Teret & Downey, *supra* note 5, at 96. This figure is impressive in light of the fact that in periodic testing of brake systems, tires, steering and lights, the reliability percentage only ranges from 86 to 98 percent. *Id.*

43. "Also using the on-road data from this fleet of cars, there was a 54 percent reduction in deaths and a 56 percent reduction in serious or severe injury to occupants in cars equipped with air bags." *Id.* (citing NHTSA PROGRESS REPORT, *supra* note 12). It is interesting to note that all of these figures are based on everyday real life accidents and not simulations, making the effectiveness of the air bags even more difficult to rebut. *Id.*

44. *See* Lewin, *Lawyers Press Products Liability Air Bag Suits*, L.A. Daily J., Nov. 19, 1984, at 14, col. 4.

45. *See* Annot., 42 A.L.R. 3d 560, 567 (1972). "A manufacturer owes a duty to use reasonable care in the design of its products to protect against an unreasonable risk of injury or enhancement of injury to the user of the product." *Id.* Additionally, the intended use of an automobile includes exposure to foreseeable hazards of collisions and

should be held strictly liable for deaths and injuries resulting from their failure to equip cars with air bag protection.[46] Plaintiffs are contending that the manufacturers have placed a product into the market which is unreasonably dangerous to consumers.[47]

The primary legal basis for most air bag suits has been the doctrine of crashworthiness[48] which provides that a manufacturer may be held liable for injuries sustained in a vehicular accident due to a defect that was perhaps not the cause of the accident, but which enhanced the degree of the injuries suffered in the accident.[49] This

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impacts. Therefore, recovery against automobile manufacturers should not be limited to situations where the defect in design was the causative factor in the accident, because the accident and resulting injury, which is usually caused by the "second-collision" of the occupant with the interior of the car, are both foreseeable. *Id.* *See also* RESTATEMENT (SECOND) OF TORTS § 398 (1966):

> A manufacturer of chattel made under a plan or design which makes it dangerous for the uses for which it is manufactured, is subject to liability to others whom he should expect to use the chattel or to be endangered by its probable use for physical harm caused by his failure to exercise reasonable care in the adoption of a safe plan or design.

Id.

46. *See* RESTATEMENT (SECOND) OF TORTS § 402A (1966). The Restatement provides in pertinent part:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property
> . . . .
> . . .
> (2) The rule . . . applies although (a) the seller has exercised all possible care in the preparation and sale of his product . . . .

Id.

Although this doctrine is not easily applied, some states have adopted their own versions of the strict liability doctrine. *See* R. GOODMAN, *supra* note 3, at § 1.2, at 5. Differing interpretations have resulted and courts and attorneys are still wrestling with the definition of "defective" and the "unreasonably dangerous" requirement. *Id.*

47. *See* Lewin, *supra* note 44, at 14, col. 4. The argument is that cars which are not equipped with air bags or other passive restraint systems are unreasonably dangerous. An additional theory is that "the companies were negligent in failing to exercise due care to make a crashworthy product." *Id.* *See also infra* notes 48-51 and accompanying text.

48. *See* Annot., 42 A.L.R. 3d 560, 567 (1972). Auto manufacturers are under a duty to use reasonable care in designing their products. They must protect against an unreasonable risk of injury or enhancement of injury to the user of the product. *Id.* Basically, this duty involves designing and producing automobiles so as to reduce the risk of injury to occupants of the car in the event of an accident.

49. *See* R. GOODMAN, *supra* note 3, at § 1.4, at 7. *See also* Dyson v. General Motors Corp., 298 F. Supp. 1064 (E.D. Pa. 1969). The court, in *Dyson*, held that it is the automobile manufacturer's obligation "to provide more than merely a moving platform capable of transporting passengers from one point to another. The passengers must be provided a reasonably safe container within which to make the journey." *Id.* at 1073. In *Dyson*, the plaintiff was injured when the automobile left the roadway and tipped, causing the roof to partially collapse. The defective roof did not cause the injury, but rather it enhanced the risk of injury. *Id.* at 1065, 1072-73. Because vehicular accidents are so common they constitute a reasonably foreseeable use of the car, and automobile manufacturers have a duty to provide protection. *Id.* at 1072-73. *See also* Grundmanis v. British Motor Corp., 308 F. Supp. 303 (E.D. Wis. 1970). An automobile manufacturer must accept the duty to protect the user from unreasonable risk of injury in automo-

doctrine places a duty upon auto manufacturers to design automobiles which protect occupants not only from the impact of the first collision (between the automobile and another object) but also from the impact of the second collision (between the occupants and the interior of the car).[50]

The doctrine of crashworthiness is relevant to both negligence and strict liability causes of action. The basic premise is that an automobile manufacturer must design its product so that it is safe from any reasonably foreseeable use, which includes automobile accidents.[51]

C. The Cases

The landmark case which provided the foundation for the automobile manufacturers' duty to make automobiles safe is *Larsen v. General Motors Corporation*.[52] The court ruled that auto makers have a duty to provide a safe means of transportation, or as safe as is reasonably possible under the present state of the art technology.[53] Clearly, the intended use of an automobile contemplates the foreseeable hazards of collisions and impacts.[54] Thus, the court held that automobile manufacturers may be held liable for injuries, including those which are enhanced from the manufacturers' failure to use reasonable care to avoid unreasonable risks of injury from accidents. The *Larsen* opinion focused on the very essence of air bag claims. It "perceive[d] of no sound reason, either in logic or in experience, nor any command in precedent, why the manufacturer should not be held to a reasonable duty of care in the design of its vehicle consonant with the state of the art to minimize the effect of accidents."[55]

The federal courts have held that collisions are reasonably foresee-

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bile collisions due to their knowledge of the foreseeability of auto accidents. *Id.* at 304-05 (quoting Larsen v. General Motors Corp., 391 F.2d 495, 501-03 (8th Cir. 1968)).

50. *See* R. GOODMAN, *supra* note 3, at § 1.4, at 7. *See also* Mickle v. Blackmun, 252 S.C. 202, 166 S.E.2d 173 (1969) (An automobile maker owes a duty of care to reasonably minimize the risks of death or serious injury to collision victims who upon impact, quite predictably, would be forcefully thrown against the interior of the car or outside of it.).

51. *See* R. GOODMAN, *supra* note 3, at § 1.4, at 7. *See also supra* note 48.

52. 391 F.2d 495 (8th Cir. 1968). This case involved an action against an automobile manufacturer for injuries resulting from a design defect in the steering assembly of the car. *Id.* at 496. The court held that the design was unreasonably dangerous and had enhanced the extent of the plaintiff's injuries. *Id.* at 504-05.

53. *Id.* at 502.

54. *Id.* at 502-03.

55. *Id.* at 503.

able when automobiles are used for their intended purpose.[56] Current air bag lawsuits rely on the fact that air bag systems have been functional for over a decade and should be considered within the realm of state of the art protection.[57] While proponents of the air bag system argue that automobile manufacturers have placed unrealistically high price estimates on air bag installation costs,[58] studies indicate that installation of air bag systems would not place an unreasonable economic burden on auto manufacturers.[59] The Department of Transportation, in 1983, estimated that such devices should cost no more than $320 per automobile.[60] In fact, in 1978, General Motors had estimated that with mandatory installation and increased volume production of air bag systems to the millions of units, the cost of each system would be just $96.[61]

Plaintiffs attempt to show that air bags should be considered in tests for crashworthiness, and that as a result of the industry's failure to provide this lifesaving protection, it should be accountable for deaths and injuries which could have been prevented by the air bag system.[62] The statistics which reveal the number of deaths and injuries resulting from automobile accidents each year are alarming.[63] Consumers are understandably angered over the automobile industry's failure or refusal to provide an existing protection system that could prevent such crippling injuries.

IV. THE AUTOMOBILE INDUSTRY'S ASSERTED DEFENSES

A. The Air Bag's Unproven Reliability and Lack of Public Appeal

Plaintiffs' attorneys are hoping that juries will be persuaded that automobile manufacturers should be held liable for the seemingly unnecessary human loss and suffering resulting from car accidents. However, the automobile industry is not backing down. Manufacturers assert that air bags have not proven to be reliable and that inad-

56. *See generally* Caiazzo v. Volkswagenwerk, 647 F.2d 241 (2d Cir. 1981); Dawson v. Chrysler Corp., 630 F.2d 950 (3d Cir. 1980), *cert. denied*, 450 U.S. 959 (1981).

57. Lewin, *supra* note 44, at 14, col. 4.

58. Lifsher, *supra* note 10, at 4, col. 6.

59. *See* Lifsher, *supra* note 10, at 4, col. 6; Lewin, *supra* note 44, at 14, col. 4.

60. *Id.* One of the misconceptions regarding the air bag system has been the unrealistic price estimates with which automobile manufacturers have attempted to mislead the general public. The industry estimates the extra cost of the system to be $1200 per automobile. *Id.* at 4, col. 5.

61. *See* R. GOODMAN, *supra* note 3, at § 1.7, at 16.

62. *See* Lewin, *supra* note 4, at 14, col. 4. *See also supra* notes 48-51 and accompanying text.

63. *See Time For 'Passive Restraint'*, *supra* note 1, at 4, col. 1. Each year it is estimated that 44,000 Americans are killed and 2 million are seriously injured in traffic accidents. *Id.* Additionally, approximately 114,000 severe facial lacerations and 25,000 facial fractures result each year from auto accidents. Teret & Downey, *supra* note 5, at 99 (citing INSURANCE INSTITUTE FOR HIGHWAY SAFETY, 16 STATUS REPORT (1981)).

vertent deployments are potentially hazardous to car occupants.[64] They also contend that the general public does not desire the system and does not want to be subjected to price increases which the air bag system would entail.[65] However, German manufacturer Mercedes-Benz offered the air bag restraint system as an option on select 1984 models. Company officials were so impressed with the results of the system, as well as public response, that they are now considering making the system a standard feature on all Mercedes-Benz automobiles.[66]

Air bag advocates disagree with the automobile industry's assertion that there is a lack of public interest in the air bag system. The advocates contend that manufacturers have never made a full-faith effort to market the safety device.[67] Advocates refer, for example, to a 1977 Gallup Poll and a 1980 New York Times Poll which revealed that nearly half of all drivers favored air bag installation.[68]

Automobile manufacturers have claimed that the air bag system protects only against front-end collisions and not against side and rear collisions.[69] Proponents of the system agree that the air bag system will not be effective in all types of accidents. It is primarily designed to provide occupant protection only in the event of frontal collisions.[70] Proponents rebut the industry's argument with a quotation from the NHTSA: "To say air cushions are a poor idea because they do not provide protection from all types of crash injuries is like arguing that polio vaccine shouldn't be used because it doesn't cure cancer."[71]

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64. Lifsher, *supra* note 10, at 4, col. 3-5.

65. *Id.* at 4, col. 5.

66. *Id.* at 4, col. 4. Company officials of Mercedes-Benz boast that, to date, they have experienced nine air bag deployments, and in all instances the system operated successfully. Tests also have indicated that the system will not inadvertently deploy and inflate with full braking power of the car applied at high speeds. *Id. See also supra* note 39, 41 and accompanying text.

67. Lifsher, *supra* note 10, at 4, col. 6.

68. *Id.* The polls also found that 65 percent of drivers under age 35 favored air bags. *Id.* These statistics showed the system's acceptability to a large percentage of the population. Perhaps, the reason these statistics are not higher is due to the public's lack of knowledge about air bags, rather than its disapproval of them.

69. *Id.*

70. *Id.* at 4, col. 5.

71. *Id.* at 4, col. 6. Proponents of the air bag system have also asserted that the combined use of lap seat belts and air bags would protect drivers against most accidents. *Id.* Proponents argue that even though the air bags will not afford protection in all types of collisions, 60 percent of all accidents involve frontal impact. Thus in at least 60 percent of all accidents the occupants are better protected. *Id.* at 4, col. 3.

B. *The Automobile Manufacturers' Compliance with Existing Federal Safety Standards*

Automobile manufacturers assert that they have violated no federal regulations by not providing air bags. To the contrary, they believe they have complied with all safety standards set out by the NHTSA. However, it should be pointed out that the failure of the federal government to require this lifesaving device does not serve to exempt automobile manufacturers from their common law duty to provide a reasonably safe product under state of the art technology.[72] Other federal motor vehicle standards have been held to represent only a minimum duty of care. "[A] manufacturer's compliance with these standards is not conclusive on the question of a manufacturer's liability."[73] Standards can also become outdated and fail to respond to new technology. Thus, automobile manufacturers have a common law duty to act reasonably in providing safe transportation to the public. This duty should include equipping cars with safety devices of proven effectiveness, such as the air bag system.[74]

C. *Seat Belts Satisfy the Automobile Manufacturer's Duty to Provide a Reasonably Safe Product.*

Seat belts are often an effective means of occupant protection, when used. Automobile manufacturers, however, are aware of the fact that only eleven percent of all car occupants use them.[75] A question that merits further analysis is whether the provision of seat belts by automobile manufacturers satisfies the reasonably-safe-product duty owed to the consumer.[76] Manufacturers maintain that cars are reasonably safe provided that consumers use the seat belts and this satisfies the duty of care owed by them. However, it may be argued that this assertion is perhaps not entirely logical or consistent, and fails to recognize which party owes a duty to render the product reasonably safe.

The provision of seat belts in automobiles has the ultimate effect of shifting the responsibility to the consumer to render the automobile reasonably safe. The consumer is placed in the position of having to choose whether or not the car will provide accident protection each

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72. *See* Teret & Downey, *supra* note 5, at 96-97. "The National Traffic Motor Vehicle and Safety Act of 1966 [15 U.S.C. §§ 1381-1431 (1982)], under which safety standards are promulgated, expressly states that 'compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law.' " *Id.* at 99 (quoting 15 U.S.C. § 1397(c) (1982)).

73. *Id.* (citing Arbet v. Gussarson, 66 Wis. 2d 551, 225 N.W.2d 431 (1975); Buccery v. General Motors Corp., 60 Cal. App. 3d 533, 132 Cal. Rptr. 605 (1976); Roberts v. May, 583 P.2d 305 (Colo. 1978)).

74. *Id.*

75. *Id.*

76. *See supra* note 48 and accompanying text.

time he and his family drives the automobile. This shifting of responsibility exemplifies the fact that the automobile industry has not produced cars that are reasonably safe, but rather, cars which "could" be safe, depending upon whether or not the consumer chooses to buckle up.

Products liability law provides that *manufacturers* owe a duty to provide a reasonably safe product,[77] not a product that provides an optional "self-service" protection system. It may be argued that the consumer does not owe a duty to render the product safe for his own use. Therefore, why permit automobile manufacturers to place the consumer in such a position? It is generally agreed that the use of a seat belt is not overly cumbersome. However, if the consumer either refuses or forgets to use the seat belt, he is now using a product that is unreasonably dangerous. Automobiles, as produced today, do not provide occupants with accident protection. It is conspicuously the responsibility of the consumer to render the automobile reasonably safe. If automobiles were equipped with air bag protection systems, automobile manufacturers could then maintain the position that the cars are reasonably safe in and of themselves without having to rely upon the contingency of consumers' affirmative actions.

The foreseeable use doctrine of products liability law imposes a duty on manufacturers to provide protection for both foreseeable uses and foreseeable misuses of the product.[78] The nonuse of seat belts would qualify as a foreseeable unintended use of the automobile. As such, automobile manufacturers would have a legal duty to protect consumers from the dangers of using the automobile without a seat belt by providing secondary passive restraint devices such as air bags or automatic seat belts.

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77. *See supra* notes 48-51 and accompanying text.

78. *See* Barker v. Lull Engineering Co., Inc., 20 Cal. 3d 413, 428-29, 573 P.2d 443, 453-54, 143 Cal. Rptr. 225, 235 (1978). The liability of a manufacturer for injuries caused by its product does not depend upon a finding that the manufacturer should have foreseen the precise manner in which a person might be injured. Nor is it necessary for a plaintiff to show that the buyer utilized the product in a manner intended by the maker. It is sufficient that the use be a foreseeable one even though it was unintended. *Id. See also* Calkins v. Sandven, 129 N.W.2d 1 (Iowa 1964). The *Calkins* court rejected the defendant's argument that their design of a wagon was sufficient to guard against the reasonable probability of harm to users. Plaintiff had sustained injuries as a result of stumbling and catching his hand in a six inch opening of the wagon. Defendants maintained that this use of the wagon was unintended. The court held that it was reasonably foreseeable that someone might be hurt due to the defendants' failure to guard the opening, and that it did not matter whether the injury occurred pursuant to an unintended use as long as such use was reasonably foreseeable. *Id.* at 8.

D. *Conformity with Industry Custom*

Automobile manufacturers have also asserted the defense of compliance with industry custom. They argue that it is not presently the custom of the automobile industry to offer air bag systems in automobiles. However, this is not a very strong assertion because it has been held that the reasonableness of an industry custom itself is always open to question.[79] When an industry decides to withhold a protective device from the public, that custom itself may be found to constitute negligence.[80]

In the case of *The T.J. Hooper*,[81] the court established the rule regarding compliance with industry custom. The case involved the defendant's failure to equip its tugboat with a radio capable of receiving weather reports. The T.J. Hooper had been hired to transport plaintiff's barge which ultimately sank due to bad weather. Plaintiff contended that this would not have occurred if The T.J. Hooper had been equipped with a weather radio. Judge Hand found the defendant negligent, notwithstanding the industry custom of equipping such vessels with weather radios. Judge Hand stated:

> [A] whole calling may have unduly lagged in the adoption of new and available devices. It never may set its own tests, however persuasive be its usages. Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission.[82]

It appears, perhaps with the exception of select Mercedes-Benz models, that the automobile industry as a whole has "unduly lagged" in providing the air bag system, which has statistically been demonstrated as the type of occupant protection system needed in present day automobile travel.

V. The Doctrine Of Crashworthiness And Air Bags

Air bags are designed and have been proven to increase automobile crashworthiness in frontal collisions. Since it is firmly established that automobile manufacturers have a duty to build reasonably safe cars, based on state-of-the-art technology and feasibility considerations,[83] the only remaining inquiry of concern in this area of the law is whether an automobile manufacturer who has not installed air bags has fully complied with that duty. Based on traditional tort principles, this issue should be resolved by a jury.[84]

In *Larsen*, the court concluded that automobile manufacturers

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79. *See infra* notes 80-82 and accompanying text.
80. *See* Elsasser v. American Motors Corp., 81 Mich. App. 379, 265 N.W.2d 339 (1978).
81. 60 F.2d 737 (2d Cir. 1932).
82. *Id.* at 740.
83. *See Larsen*, 391 F.2d at 503. *See also supra* notes 49-50 and accompanying text.
84. Coben, *supra* note 11, at 30.

have a duty to provide a reasonably safe automobile. This rule has been adopted in virtually all jurisdictions which have addressed the crashworthiness issue.[85] In *Fox v. Ford Motor Company*,[86] the plaintiffs were injured when, as passengers in the back seat of the automobile, they were catapulted in an accident. They struck the back of the front seat even though they had been wearing lap seat belts. The seat belts afforded inadequate protection. As a result, the plaintiffs impacted with the interior of the car, incurring serious injuries and death.[87]

The Tenth Circuit Court of Appeals affirmed the plaintiffs' cause of action based upon the crashworthiness doctrine.[88] The court ruled that a legitimate jury issue existed as to whether defendant Ford would be liable for failing to provide shoulder harness seat belts in the back seat of the car. This issue existed despite the fact that none of the American manufacturers had provided such protective measures in 1970 automobiles.[89] Expert testimony had been introduced that the automobile was defective without the back seat shoulder harness. The court stated that the absence of rear shoulder harnesses presented a valid claim, and "the jury could find that it created an unreasonable risk of injury."[90]

The crashworthiness doctrine has been applied to a variety of passive restraint systems based either on their absence or inadequacy. For example, in *Buccery v. General Motors Corp.*,[91] the California Court of Appeal reversed entry of a nonsuit and held that there was substantial evidence to support plaintiff's crashworthiness claim based on General Motors' failure to provide a head restraint which would prevent injury from a rear-end impact.[92] This decision concluded that when a vehicle does not include viable safety designs to protect against foreseeable injuries, the manufacturer may be found

85. *See, e.g.*, Dorsey v. Honda Motor Co., Ltds, 655 F.2d 650, 655 (5th Cir. 1981) (Florida law requires manufacturers to design and produce cars that eliminate unreasonable risk of foreseeable injury); Huff v. White Motor Corp., 565 F.2d 104, 110 (7th Cir. 1977) (Indiana Supreme Court would adopt the rule that a manufacturer of automobiles owes a duty to make their products reasonably fit for intended purposes, which includes potentiality for collisions); Huddell v. Levin, 537 F.2d 726, 735 (3d Cir. 1976) (New Jersey law requires automobile manufacturers to take reasonable steps to design and produce cars that will minimize unavoidable danger).

86. 575 F.2d 774 (10th Cir. 1978).

87. *Id.* at 777.

88. *Id.* at 780-81.

89. *Id.* at 788-89.

90. *Id.* at 784.

91. 60 Cal. App. 3d 533, 132 Cal. Rptr. 605 (1976).

92. *Id.* at 550-51, 132 Cal. Rptr. at 616.

liable for failure to design a crashworthy automobile.[93]

The plaintiff in *Turner v. General Motors Corp.*[94] succeeded on his crashworthiness claim by showing that his car was not designed with a roll bar or roll cage, which would have mitigated the injuries he suffered when his car rolled over and the roof of the car crushed him. The Texas Appellate Court reversed the trial court's ruling that the plaintiff had not stated a cause of action.[95] It was established that no mass-produced automobile in the United States had been manufactured with a roll bar or cages, and it was further shown that the roofs of G.M.'s automobiles were no more unsafe than the roofs of other vehicles of the same year.[96] The court held that the industry custom of not installing such safety devices, even though they were readily available, showed that the custom itself was unreasonably dangerous.[97]

More recently, in *Dawson v. Chrysler Corp.*,[98] the court upheld a finding of liability based on a commonly used car frame that resulted in a police officer's quadriplegia. The officer's car skidded into a telephone pole after he lost control of the vehicle. The car frame was determined to be unreasonably dangerous, despite the fact that it was commonly used within the industry.[99] The same logic could be applied to the air bag system.

It seems that one of the keys to recovery under a crashworthiness claim is the showing of a feasibly safe design feature that *would have* prevented or reduced the extent of the injuries sustained. Cases have held that evidence of a safety device that would protect against a product's propensity to create a danger is sufficient to present a question for the jury.[100] Once the issue is brought, injured plaintiffs may obtain the jury's sympathy which could prove to be a key factor in the outcome of such a case.

VI. CURRENT TRENDS IN AIR BAG LITIGATION

Numerous air bag lawsuits have been brought before the courts recently. Plaintiffs argue that the air bag system should be considered in the court's crashworthiness analysis. Although some air bag cases have proceeded to trial, to date, none have reached a decision by the

93. *See* Coben, *supra* note 11, at 31.
94. 514 S.W.2d 497 (Tex. Civ. App. 1974).
95. *Id.* at 507.
96. *Id.* at 506.
97. *Id.* at 506-07.
98. 630 F.2d 950 (3d Cir. 1980).
99. *Id.* at 960.
100. *See, e.g.*, Chavarria v. Ford Motor Co., 124 Ariz. 158, 602 P.2d 826 (1979) (the lack of rollover protection and the tendency of the vehicle to overturn raised an issue of fact of whether it was unreasonably dangerous).

trier of fact.[101] However, this fact is misleading because many cases have resulted in settlement agreements before being presented to the judge or jury.[102]

In *Burgess v. Ford Motor Co.*,[103] Ford was sued by a woman who had suffered severe brain damage. The 1975 Ford Pinto in which she was riding as a front seat passenger, and which was not equipped with air bag safety restraints, was struck by a Camaro in a front-angle intersection collision. Plaintiff claimed that the lack of an air bag protection system had rendered the 1975 Pinto uncrashworthy.[104] A large class action suit has been brought in Florida seeking damages of $25 million on behalf of all recent accident victims in Florida, based on the lack of air bag protection.[105] Plaintiff's lawyers argue that it is unnecessary and illogical for people to be killed and physically impaired as a result of automobile accidents when auto manufacturers have the present means to prevent such tragedy.[106]

It is interesting to consider why automobile manufacturers have chosen to settle particular claims before they go to trial. Is the automobile industry concerned about a possible adverse judgment in an air bag action? Do they fear the floodgate effect of the countless other injured plaintiffs that may seek judicial satisfaction for their injuries? Although the automobile industry is perhaps fearing an adverse judgment, they are not backing down. However, air bag plaintiffs remain optimistic that consumer actions, such as lawsuits, will strongly impact the future of automobile safety standards in this country. It seems that the focus of judicial concern is how to regulate the flow of potential liability against auto makers. Concerns for costs, technology, and marketability are primary considerations in providing a safe product. However, evidence demonstrates that air bag systems are feasible with respect to all three of these concerns.

It is the plaintiff's burden to persuade the court of these facts by providing the empirical data that supports this assertion. Even if a court rules for a particular plaintiff in an air bag suit, it would seem

101. Frank, *Pumped-up Issue*, A.B.A. J., Aug. 1985, at 22, 22.

102. Lewin, *supra* note 44, at 14, col. 6.

103. Civ. Action No. CV 79-3515 (cited in Frank, *supra* note 101, at 22).

104. *Id.* The settlement in this case is the largest to be divulged, amounting to $1.8 million. *Id.* Ford has also persuaded a court to seal 5,000 pages of documents, cost studies, and crash tests which the plaintiff's attorney was using to show that Ford could have used air bags to avoid injuries like those suffered by the plaintiff. *See* Lewin, *supra* note 44, at 14, col. 6.

105. *See* Lewin, *supra* note 44, at 14, col. 6.

106. *See id.*

unrealistic or illogical to say that this would subject automobile manufacturers to liability for claims by all injured plaintiffs. Each plaintiff remains obligated to prove that his particular injuries resulted from the defendant's failure to build a crashworthy and reasonably safe automobile. Plaintiffs must also show that the injuries sustained and the type of accident involved are the kind that an air bag system would have prevented.[107]

In *Evers v. General Motors*,[108] the U.S. District Court for the Middle District of Florida granted summary judgment in favor of GM. Plaintiff was injured when the car he was driving was struck by a Toyota. The Toyota was traveling at approximately 30 miles per hour when it hit plaintiff's car. The impact of the collision caused both a crippling pelvic injury and permanent brain damage to plaintiff. Plaintiff's liability claim alleged a defect in the passenger restraint system and a defect resulting from GM's failure to install an air bag system. The district court in granting summary judgment found that plaintiff's claim of defect in the restraint system was unsupported by any evidence that a defect existed or contributed to plaintiff's injuries.

This case was recently appealed and decided before the U.S. Court of Appeals for the Eleventh Circuit, in which the court affirmed the district court's grant of summary judgment.[109] The court based its decision on the finding that appellant had not provided any specific facts to support its claim. Additionally, the court noted the fact that two of the plaintiff's experts had sharply conflicted as to their opinions with respect to air bag protection.[110]

The *Evers* case demonstrates that not all cases involve fact patterns that would qualify under air bag analysis. In such cases plaintiffs will be limited in establishing liability. Fact patterns must be suitable to pursue a remedy under the air bag theory. Because air bag litigation is relatively new, plaintiffs must be alert to the types of theories and arguments that are meeting with approval before the courts.

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107. Coben, *supra* note 11, at 33. Such claims would further be limited to cases strictly involving frontal impacts since the air bag system is only deployed in such accidents. *Id.*

108. No. 84 Civ. 3619 (M.D.F. Oct. 20, 1985) (official cite presently unavailable).

109. Evers v. General Motors Corp., 770 F.2d 984 (11th Cir. 1985).

110. *Id.* at 986. Plaintiff had presented an affidavit of one of their experts that had testified, that in his opinion, an air bag system would probably have reduced the severity of or prevented plaintiff's injuries. The court noted, however, that this testimony had contradicted the earlier deposition of plaintiff's expert Dr. Huelke, who had explained that air bags are not designed to provide protection against side impacts. Plaintiff's case did involve a side impact type collision. *Id.*

VII. CONCLUSION

In late 1980, shortly before the end of her term, NHTSA administrator Joan Claybrook wrote executives of the major auto companies urging them to adopt certain safety features within their automobiles. One such suggestion involved the concern for air bag protections, in which she wrote:

> Air Bags-Not since 1976, when GM stopped selling cars equipped with air bags, has the American public been given a chance to purchase at any price, a new car built with air bag automatic crash protection. This choice of an unobtrusive and potentially superior crash protection system has been denied the American public for far too long at a great expense in lives and injuries.[111]

It is apparent that despite attempts to influence legislators, as well as auto makers, to provide air bag protection to the American public, the air bag's future remains uncertain. Recently, facts surrounding the air bag issue have been exposed and are now subject to review by the American public. The consumer should prove to be a valuable ally for the air bag system and should have a significant impact upon its eventual implementation.

A final question is which branch of the government will take the first steps toward mandating air bags as part of automobile safety standards. Due to the current exposure of related air bag facts, auto makers will probably take it upon themselves to offer air bag restraint systems in the near future, followed by federal regulations requiring them. The basic premise that you can't hide the facts and evidence from the public forever has proved to be true in regard to the long-awaited air bag protection system.

FRANK WATERS

111. R. GOODMAN, *supra* note 3, at 21.